David M. Daniels (SBN 170315)
Steven H. Gurnee (SBN 66056)
Nicholas P. Forestiere (SBN 125118)
Gurnee & Daniels, LLP
2240 Douglas Boulevard., Suite 150
Roseville, CA 95661-3875
Telephone: (916) 797-3100
Facsimile: (916) 797-3131

Amy E. Dias (pro hac vice motion pending)
aedias@jonesday.com
JONES DAY
500 Grant Street, Suite 3100
Pittsburgh, PA 15219-2502
Telephone: (412) 391-3939
Facsimile: (412) 394-7959

Matthew W. Lampe (pro hac vice motion pending)
mwlampe@jonesday.com
JONES DAY
325 John H. McConnell Boulevard, Suite 600
P.O. Box 165017
Columbus, OH 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Attorneys for Defendants
Alderwoods Group, Inc. and Service Corporation International

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Deborah Prise, et al., on behalf of themselves and all other employees similarly situated,

Plaintiffs,

v.

Alderwoods Group, Inc., et al.,

Defendants.

Case No. C 07-05140 EDL

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

[FRE 201(b)]

Date: December 4, 2007
Time: 9:00 a.m.
Ctrm: E

Trial Date: None Set

Moving parties ALDERWOODS GROUP, INC., and SERVICE CORPORATION INTERNATIONAL, hereby request that the Court take judicial notice pursuant to FRE 201(b) of the following documents attached hereto:

Exhibit A: Transcript of Hearing on Thursday, April 19, 2007 in the matter *Prise, et al. v. Alderwoods Group, Inc., et al*, Case No. 2:06-cv-01470-JFC, Docket No. 33, United States District Court for the Western District of Pennsylvania before the Honorable Joy Flowers Conti, District Judge.

Exhibit B: Transcript of Hearing on September 6, 2007 in the matter *Prise, et al. v. Alderwoods Group, Inc., et al*, Case No. 2:06-cv-01470-JFC, Docket No. 33, United States District Court for the Western District of Pennsylvania before the Honorable Joy Flowers Conti, District Judge.

Exhibit C: Plaintiffs.' Motion for Leave to File Second Amended Complaint in the matter *Prise, et al. v. Alderwoods Group, Inc., et al*, Case No. 2:06-cv-01470-JFC, Docket No. 33, United States District Court for the Western District of Pennsylvania.

International Board of Teamsters v. Zantop Air Transportation Corp., 394 F.2d 36, 40 (6th Cir. 1968) ("[A] court may take judicial notice of the rules, regulations and orders of administrative agencies issued pursuant to their delegated authority"); *U.S. v. City of St. Paul*, 258 F.3d 750, 753 (8th Cir. 2001) *cert. denied*, 535 U.S. 904 (writing showing an agency's interpretation of its own regulations is entitled to judicial notice absent showing the interpretation is unreasonable or inconsistent with the statutory authority).

////

////

////

////

Dated: October 12, 2007

GURNEE & DANIELS LLP

By: s/Steven H. Gurnee
Steven H. Gurnee
David M. Daniels
Nicholas P. Forestiere

Attorneys for Defendant
ALDERWOODS GROUP, INC. AND
SERVICE CORPORATION
INTERNATIONAL

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH PRISE, et al

Plaintiffs

vs. Civil Action No. 06-1641

ALDERWOODS GROUP, INC., et al

Defendants

PROCEEDINGS

Transcript of Hearing on Thursday, April 19, 2007, United States District Court, Pittsburgh, Pennsylvania, before Honorable Joy Flowers Conti, District Judge.

APPEARANCES:

For the Plaintiffs: J. Nelson Thomas, Esq.
Charles H. Saul, Esq.
Patrick J. Solomon, Esq.
Liberty J. Weyandt, Esq.
Justin Cordello, Esq.
Michael Lingle, Esq.

For the Defendants: Matthew W. Lampe, Esq.
Amy E. Dias, Esq.

Reported by:
Michael D. Powers
Official Court Reporter
Room 5335 USPO & Courthouse
Pittsburgh, Pennsylvania 15219
(412) 208-7572

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(Court reconvened on Thursday, April 19, 2007, at 4:00 p.m.)

THE COURT: This is a hearing on a motion for expedited collective action notification and a motion to strike in the civil action Prise versus Alderwoods Group Inc., Civil Action No. 06-1641.

Will counsel please enter your appearance.

MR. THOMAS: Yes, Your Honor. Nelson Thomas on behalf of the plaintiffs.

MR. SOLOMON: Patrick Solomon on behalf of the plaintiffs.

MR. SAUL: Charles Saul on behalf of the plaintiffs.

MS. WEYANDT: Liberty Weyandt on behalf of the plaintiffs.

THE COURT: I am sorry?

MS. WEYANDT: Liberty Weyandt on behalf of the plaintiffs.

MR. CORDELLO: Justin Cordello on behalf of plaintiffs.

MR. LINGLE: Michael Lingle on behalf of the plaintiffs.

THE COURT: Who is going to be speaking for the plaintiffs?

MR. THOMAS: Your Honor, I will be. Nelson Thomas.

THE COURT: Nelson Thomas.

MR. LAMPE: Matthew Lampe on behalf of the defendants.

MS. DIAS: Amy Dias on behalf of the defendants.

THE COURT: Who will be speaking on behalf of the defendants?

MR. LAMPE: I will, Your Honor. Matthew Lampe.

THE COURT: This is a hearing on a motion for an expedited collective action notice to go out, and I have already had sort of a preliminary hearing on this previously, and that was held on January 31st, 2007, of this year.

And the standards that the Court went through there in considering a motion for expedited class notification pursuant to Section 216(b) of the Fair Labor Standards Act -- and I will call that throughout this hearing the FLSA -- the potential plaintiffs must opt into a collective action suit and affirmatively notify the Court of their intentions to join the suit.

In order to facilitate that notice, the representative plaintiffs must show that the potential plaintiffs are similarly situated to the representative plaintiffs and that the action should go forward as a representative action. To establish that the absent collective action member is similarly situated, plaintiffs must, one, be or have been employed in the same corporate

department, division and location; two, have advanced similar claims; and, three, have sought substantially the same form of relief.

And that is from Asencio versus Tyson Foods, Inc., 130 F.Supp. 660, Eastern District of Pa., 2001, citing Lockhart versus Westinghouse Credit Corp., 879 F.2d 43, Third Circuit, 1989.

There is a two-tier approach that courts often use with respect to determining whether plaintiffs are similarly situated. Mooney versus Aramco Service Company, 54 F.3d 1207, Fifth Circuit, 1995. The first stage or the first tier is what is called the notice phase. And that begins when the plaintiff seeks authorization to issue notice to the other prospective class members which would permit them to be notified that they could opt into the action.

This notice usually occurs at an early stage and the Court will determine the viability of a possible class based upon the claim and affidavits in support of that claim.

Morisky versus Public Service Electric and Gas Company, 111 F.Supp.2d 493, District of New Jersey, 2000. At this first tier, there is a relatively low burden to show the similarly situated requirement.

And from Asencio, 130 F.Supp.2d at 663, the Court may conditionally certify the class for the purposes of notice and discovery under a comparatively liberal standard,

that is, by showing that or by determining that the members of the punitive class, quote, were together the victims of a single decision, policy or plan, close quote.

Sperling versus Hoffmann-LaRoche, 118 F.R.D. 392, District New Jersey affirmed 862 F.2d 439, Third Circuit, 1988.

And after the first tier, then the second tier will occur where all the consents have come in and there will be further discovery to determine whether or not the defendant violated the FLSA and the matter is ready for trial. And at that second tier, the Court will reconsider the class certification issue in light of the similarly situated standard. And will conduct a specific fact review with respect to the class members who have opted in, and will look at matters such as employment setting, defenses and other procedural issues.

The Court finds that at the second tier, if they are not similarly situated, then the conditional class is de-certified.

At this stage, we are at what I would classify the first tier. It's a question of whether the notice should go out. And given that this is a collective action under Section 216(b) of the FLSA, there is potential prejudice if notice doesn't go out because as the clock goes on, individuals will lose their rights because they may be barred

in whole or in part for some claims that they may legitimately have if, down the road after discovery is completed, or whatever discovery is relevant to what we would normally do in a Rule 23 class action situation, having a more robust hearing and a more lengthy time prior to the determination of class certification, valuable rights could be lost.

So, I think that's why the courts do take an approach at this stage to be fairly liberal in approaching the decision-making process.

My preliminary sense, having read the various briefing, is that at least with respect to Alderwoods, the questions of whether there is a common policy with respect to the five classes, I think there would have to be some refinement of the notice that would go out and a refinement of the punitive classes that, at this preliminary stage without really looking at the merits, just looking at some of the filings that were made and the allegations, that there is arguably enough to move forward on.

And the things that the Court would look to at this stage would be the affidavits. I know there is a motion to strike that is there, but -- and some of it is set forth as being hearsay. But, some of the things that are hearsay -- and I will hear some argument on this -- I am not sure is hearsay. It may be admissions if a manager is making a

statement. If it would fall within that party admission, it is not hearsay.

I can tell you if a superior or representative of the company tells me something and that is adverse to the company, I can certainly put that in an affidavit because it might be a party admission and, therefore, could come in.

So, you know, it may not be -- everything that was arguably set forth as hearsay doesn't necessarily fall within that. And then there is an affidavit from someone who is or was a manager and had a familiarity and said that they were familiar with the corporate policies across the board, and whether, on cross-examination, if they are deposed and it comes out that they really lack a complete foundation for that, I think that's a different story. But, just to take the affidavit at face valid may be enough at this stage to move forward.

I am more troubled about the issues with respect to Service Corporation International. There is, in the defendant's response, a statement that Service Corporation International is, itself, just a holding company and that has no employees. That's typically the way -- or if they do have employees, they are generally the very high-up officers of the company, would not be the hourly employees of the nature that would be the punitive class members in this case.

So, if that is the case, even though you have a

10K, a 10K is usually, you know, is usually done on a consolidated basis where they are representing a multiple tier of companies. And I know, and I did look over the 10K where it used the words, we have this and we have that. But, as a legal matter, maybe they don't have employees. And I have sufficient concerns about that, but I don't think I can rely purely on a 10K in making that assessment.

So, my question would be if you have -- if you operate as a holding company and you have fifty subsidiaries, say, you have a subsidiary in each state, you have a separate entity in each state, do you have to sue each separate subsidiary and then you can bring them all together? Or can you just, in this context, sue the parent and make them liable for the overtime or FLSA infractions that are at issue here? I don't know.

I don't have an answer to that and it wasn't robustly briefed by the parties, but I am troubled by that. So, I am not sure that I would be able to move forward and certify a class of employees if the defendant is merely a holding company and really wouldn't have those type of employees.

So, what good have we done to send out the notice? We will get a flurry of people coming back. But, if you tell the defendants to send it out to your employees, you know, they will send it out maybe to the head officers who won't be

within that class.

So, those are sort of the issues that I see here today.

So, I will let the defendants be heard first on the Alderwoods situation because my preliminary assessment would be in favor of the plaintiffs, albeit I think there is some refinements that have to be made to the punitive classes, as well as to the form of notice that they are proposing to send.

MR. LAMPE: Thank you, Your Honor. Good afternoon. I am not sure if this is on or if I am speaking loudly enough. May I address the SCI issue first?

THE COURT: Yes. I am sort of going in your favor that way.

MR. LAMPE: I understand. I wasn't sure if procedurally you wanted me to speak second to him on that.

THE COURT: I sort of found for you. I would like to hear from the other side if I have it wrong unless you know something I don't.

MR. LAMPE: I would like to point out there was an allegation made in the plaintiff's reply brief as to Service Corporation International relying on, and you alluded to it, relying on the annual report and the 10K. And what I think is important to point out to Your Honor is, I have the -- all three of them here and would be happy to submit them, but in

the annual report, there is the annual report and then the 10K is right behind, it's a booklet.

And if you open the annual report and look at the very first page, there is a reference to the Service Corporation International and it goes on to speak about it, and there is an asterisk after Service Corporation International. If you go down to the bottom of the page, you will see the very point that you were making, and that is that, as used here, SCI and the company refer to Service Corporation International and companies owned directly or indirectly by Service Corporation International.

So, there is simply nothing inconsistent with our affidavit that we submitted indicating that this is a holding company that has no employees. It's not just a few. It has none. And these annual reports -- because, as you said, this is a consolidated report and the footnote very specifically says that at the top --

THE COURT: That would be -- my understanding would be consistent with how public companies handle their 10K reporting requirements.

MR. LAMPE: So, as to SCI, it is a holding company. It has no employees. It would be pointless to issue notice to its employees. There are none.

And you are right that there was no briefing or discussion of the other question that you raised about

whether or not --

THE COURT: You could just sue the parent and bring them all in?

MR. LAMPE: Right.

THE COURT: In a normal case, you wouldn't be able to do that. I don't know if there is some exception in these circumstances.

MR. LAMPE: Under the FLSA, there is a doctrine called the single employer, also referred to as the joint employer doctrine. It is, as you would expect, the parent can be held liable based on the fact of the -- based on the six factor test, whether there is interlocutory boards, whether the formalities are observed --

THE COURT: We don't have any of that.

MR. LAMPE: Right, Your Honor. There has been no evidence at all to suggest that the parent could be liable for the acts of these various and myriad subsidiaries spread around the country.

So, we would submit that your tentative views on the issue of SCI are correct and that no notice to the order should be issued at this time.

THE COURT: At this time.

MR. LAMPE: I am going to try convince you that your preliminary views to Alderwoods is not right. In a case like this, as you said again, you previewed the law. The

issue is, is there evidence of a common unlawful policy?

THE COURT: Right. And you have a number of affidavits, some of which is hearsay. So, the hearsay, I will tell you I will disregard the hearsay or give it very little weight.

It is very different at this stage where it is not -- I am not making factual findings, so there are a number of other cases, none that are precedential for this Court, that have discussed the motion to strike in this context. That's Crawford versus Lexington-Fayette Urban County Government, 2007 Westlaw 293865, Eastern District Kentucky, January 26, 2007, showing the relaxed standard.

But, I think most Judges would say at this stage when you are reviewing this type of information, if it is true hearsay, you give it very little weight, if at all, and I can disregard it and I can treat each of those affidavits in an appropriate fashion.

There is some other aspect of the affidavits, however, that I don't find would be hearsay and would have some evidential value with respect to these matters and I just commented on a few of those aspects.

MR. LAMPE: In these cases, they set up, as you said, is there evidence of a common unlawful policy? And there is a distinction in the cases between, on the one hand, evidence of wage problems that could suggest a common,

unlawful corporate policy.

On the other hand, there is cases that deal with allegations of wage problems that were very apparently violations of company policy and certainly not the sum and substance of company policy.

THE COURT: I understand that there are. I understand from the record, and I will put this on there, that there are corporate policies that Alderwoods have that would be clearly in compliance with the law. So, the formal policies are in compliance with the law.

The question is whether, notwithstanding the corporate policy, there was an unwritten policy to, in effect, violate the written policies and to, say, disregard that and do something different which the plaintiffs argue is violative of the FLSA.

MR. LAMPE: And that was exactly what I was going to say, and let me move to the next step.

What we have then is, we have lawful policies that state employees are to be paid for all of their hours. We have allegations from five affiants, there was a sixth Alderwoods affiant included in the plaintiff's reply brief that said your order said they weren't allowed. There are five Alderwoods affiants; three of them are from the Pittsburgh area, two others are from other areas. All five are in one of twenty-five nonexempt positions represented and

these five individuals do, in fact, claim that they experienced wage problems.

In the context of the evidence before the Court, and there is the cases such as Harrison versus McDonald's and Flores versus Lifeway and England versus New Century, they say that the mere fact that there are some allegations is not sufficient to justify conditional certification.

And the Flores case, for instance, dealt with a situation where there were two allegations out of fifty employees and the Court said that is not enough.

The England case, in that case, there were two hundred affidavits, but it did not show any kind of a nexus to any sort of corporate policy. And the Court said that is not enough. These are local complaints. They are insufficient to establish a company policy.

THE COURT: That is why I made reference to the one fellow that was the manager. That was the one that was most compelling. Let's talk about him.

MR. LAMPE: McDonald's -- Harrison versus McDonald's, this is a case where there were comments attributed to a manager who supposedly said that there was improper wage violations going on in that unit and the Court said -- the Court did not find that to be sufficient to justify notice and denied the motion. And there is only one manager here and this is a manager whose name is --

THE COURT: Deborah Prise?

MR. LAMPE: Prise is the plaintiff, right.

THE COURT: Who was the manager?

MR. LAMPE: There is a manager.

THE COURT: In this case.

MR. LAMPE: There is a manager named --

THE COURT: She says as a manager, she was aware of the defendant's company-wide policy, policies, and was responsible for the enforcement of those policies at her facility and the policies were issued from the defendant's Cincinnati, Ohio headquarters and most were contained in the defendant's policy and procedures binder. Then goes on to describe those.

So, I am not -- you know, so this, what is the one that is speaking to company-wide policy?

MR. LAMPE: Let me raise -- address the very point that you mentioned. She said that there are policies kept in a binder. She does not say that the policies that she is about to describe were among those in the binder.

THE COURT: Says most were contained.

MR. LAMPE: And she goes on to describe policies. She does not say they are in the binder. There is a policy that says you have to work in the community. So, I think that there is -- I think that is a little misleading. There are no written policies that reflect these five supposedly

unlawful policies and she -- saying she enforced those policies at other her locations.

I would pose this question: If there is a written policy everyone needs to get paid for all of their hours of work and there is some unwritten company policy that says you violated the written policy, what foundation is there in the record that this woman, who worked at one location in the Pittsburgh area, would have knowledge of these practices that occurred in other locations throughout the forty states where this company operates?

It would be different if she had a written policy that said you are supposed to work off --

THE COURT: But, then you will never, ever have a case based on an unwritten policy. A lot of the things may be fodder for depositions and cross-examination of the witness. But, this is a person who purports, because of the position that she held, to be aware of company-wide policies.

MR. LAMPE: Yeah.

THE COURT: So, I don't know what more -- and then goes on with some specificity to talk about those and some of the indications that they have.

MR. LAMPE: We would submit that in a case where there is a written policy that's lawful where there is no production of an unlawful written policy and where there is no explanation in the record for how this individual, who

worked in one place, supposedly had knowledge of practices across the country, and that is insufficient, and it is a very isolated instance.

And this case does line up with the other ones in which notice was denied because in the context of how many employees and how many states there are operations, the allegations are insufficient to justify notice at this point.

Let me move to another point. You mentioned the class definition.

THE COURT: Before you go there, you would agree with me then, wouldn't you, at least as to the locale in which she was operating, whether it would be Pennsylvania or the areas that she would be in, as well as some of the other employees that are here, that you could have class issues with respect to -- you could have at least a subclass that may survive?

MR. LAMPE: We would say that, at the very most, notice would issue for two locations, Brandt and Hirsch. Those are two facilities where she was involved.

THE COURT: Before we move off of that, I would like to hear from the plaintiffs with respect to this particular affidavit and this particular manager because this is the most compelling support for the class, the nationwide notification.

MR. THOMAS: To the podium it is better?

THE COURT: You don't have anything further on this issue, on this affidavit?

MR. LAMPE: I have more on Alderwoods, but not on this one.

THE COURT: On this one, right. It is easier for me if I keep the issues together.

MR. THOMAS: Your Honor, I would note several things.

First of all, the vast majority of cases, as this Court has cited and held, go contrary to the very few outliners on which defendants rely and, in fact, even the cases on which they rely, they are patently distinguishable from this case here.

But, let me leave that aside because I think the standard has been set by the Court and we are in agreement with that.

In terms of Alderwoods, it is not correct to say that we have one manager's testimony. We have Deborah Prise, who is a manager.

THE COURT: But, I think his issue -- and this is what you need to focus on. You need somebody that is going to speak to company-wide things.

It would be one thing if you had a hundred affidavits that would include several from each state or locale that you would be involved with. But, his argument

is, your affidavits are discretely tied to just certain locations, and then the one that has the real company-wide issues is Miss Prise.

MR. THOMAS: Actually, that is not true. There is Miss Prise as a manager. There is Bob Pramik, who is a general market manager and a location manager. We also have Michael Lanza from Puyallup, Washington State, where I heard -- where the regional manager and his manager admitted the same policy existed. We have --

THE COURT: Those are the admissions that I was talking about that arguably the Court could consider.

MR. THOMAS: Jack Reddick from Independence, Kansas, where his manager and the district manager made the same admissions about company policies.

At this stage, where we are, without any discovery and given the great bridges to the people out there, to say that we have two managers directly stating that these are the policies, followed up by affiants and managers in multiple other locations, Kansas, Washington State, making the same points, as well as all of those employees confirming that all of the locations all across the country were experiencing the same violations, that is well more than enough to meet the lenient standards.

It is not the case that we need to go to each state or each location and solicit an affidavit from each of them

saying that's what this is. But, when the company managers say repeatedly this is our policy and it is enforced nationwide, that meets the lenient standard that is here.

THE COURT: Okay.

MR. THOMAS: Would you --

THE COURT: That is fine.

MR. THOMAS: Should I go on to any points I have or step down?

THE COURT: How about SCI?

MR. THOMAS: SCI. Two responses on SCI.

First of all, leaving aside their 10K and annual report, perhaps more damaging are the additional exhibits we have submitted from their own website which they refer to as having employees. You can apply for their jobs, on this website to SCI jobs. They say that we have one of the most diverse and dedicated workforces in the county. It says our people, employees of SCI continually strive to exceed expectations.

THE COURT: That is all sort of that colloquial way that holding companies often hold themselves out because they all talk about we, us, our, and it would not be uncommon for them to have a website that would be reflecting the same kinds of things that you saw in the 10K.

But, as a matter of law, when we have to ask, who is the employee who is going to be responsible for any FLSA

violations, that's what I need to look at. And at this stage, I have some sufficient concerns that SCI may not be the right defendant unless, you know, when you go through the other tests that were articulated to see if they are a single employer, you can impose that burden on them.

But, there is no evidentiary support for that here.

MR. THOMAS: Two things.

First of all, the standard under the Supreme Court is that the FLSA -- and this is in our papers -- that a broader or more comprehensive coverage of employees would be difficult to frame, and that anybody who has suffered or permitted to work, whose work benefits a company or individual, is considered that person's employer.

I will be glad to brief this in more depth on the joint employer issue, but it is a standard that is even more liberal than the Title VII standard for consideration of who the employer is, and Courts routinely say that you are.

THE COURT: The holding company is routinely held liable just because they are the holding company?

MR. THOMAS: Correct. Because they suffer for or permit the people to work.

MR. LAMPE: We completely disagree with that. As I mentioned, there is a test that deals with this very situation.

THE COURT: It's sort of like piercing the

corporate veil. That's what I was hearing. I don't have it in front of me, but it just struck me when I was reading through this, because it really wasn't briefed in any fashion when the issue was raised.

And the response was, well, look at the 10K. To my mind, knowing something, not an extensive amount about 10K's, it's just they are consolidated documents and you can't, I don't think, point to someone being an employer just because there is a 10K, and I think that would be the same thing for a website.

Now, it may be evidence when you get into this other issues as to how they are holding themselves out, but how do they hold themselves out to these employees? How were their checks written? Who did they understand the employer to have been? Where are the personnel directors and the bank accounts?

These are the types of issues, and if you have some evidence that would indicate that, maybe it would be enough to get the initial notification going out.

But, on the record before the Court today, I don't have that evidential base, even though it's a somewhat liberal standard as I indicated, that I would be comfortable in staying that I am going to send out a notice to SCI's -- anyone who may have been on call during that period of time.

MR. THOMAS: Your Honor, if I understand what you

have said, I think, you will see the good news is -- at least the good news for us and maybe the good news for the Court in dealing with this -- it is not a piercing-the-veil standard. It is a very low standard.

THE COURT: I don't have that in front of me and I am not prepared to rule on it and -- if a 10K is enough to get you there, I would be probably surprised if that were the case, but I would have to withhold judgment on that.

MR. THOMAS: With Your Honor's permission, could we submit supplemental briefing or a motion to reconsider on an expedited fashion on the joint employer position?

THE COURT: What I would do is, I would deny the motion with respect to SCI, but it would be without prejudice for you to file a subsequent motion if you feel that you have the support to do it.

So, it is not going to be a reconsideration. It just would be a new motion and it would take on -- it would have its own life.

MR. THOMAS: Thank you, Your Honor.

THE COURT: Okay.

MR. LAMPE: So, back to Alderwoods then.

The sum and substance of the record before the Court is that there are two managers. Mr. Thomas mentioned them. There is Pramik and Prise; prise at two locations in the Pittsburgh area; Pramik at two locations; one in

Harrisburg; the other one in Camp Hill. And that is it in terms of managerial evidence in this case.

THE COURT: See, a manager -- and at this lenient standard, you know, if the manager at that level has certain knowledge of and exposure to the corporate policies on a nationwide basis, that may be enough at this stage.

MR. LAMPE: I would just say the "if" that you just said is not presented in the form of evidence before the Court. There is no evidence that these two local managers had knowledge of what was going on --

THE COURT: They said they have personal knowledge because of their position.

MR. LAMPE: That takes us all the way back to the hearing on January 31st where you said conclusory allegations wouldn't be enough.

And I think all this needs to be looked at in the context of a company whose formal pay policies are completely lawful and necessary individuals. They are speaking of some unwritten policy that is supposedly in effect throughout the entire country.

How do they know that when they have only been responsible for applying these practices in their own locale? Our view is, there isn't sufficient evidence beyond the four locations.

And let me move to another point, and that is the

class definition issue that you raised. We think it's an important issue.

When the brief was filed, the request was that notice issued to these five subclasses, and we pointed out that it is impossible to know which employees are within these subclasses because they are built on the allegations in the case.

And there is good authority from this Court in Mueller versus CBS that indicates that a class cannot be certified where you have to do a little mini-adjudication on the merits to find out who is the class member.

There is a very practical problem here. If you order us to issue a notice, we need to know which employees to issue the notice to. And the way the class definition reads is, for instance, class number one, the people in the class are those people who have been required to work in the community but have not been paid for that.

In our view, there is no one that meets that definition. That's what's in dispute in the case.

THE COURT: I think the response there would be -- and this is a problem. I said there had to be some refinement.

My understanding is that the people that had required that were the funeral directors around the country who were hourly employers and the theory would be that it is

all of those people who worked during that period of time are punitive class members.

MR. LAMPE: Well, I think that would have been a more reasonable position for the plaintiff to take, and I can I can see that the Court might reach that view, but that is not what the plaintiffs argued in their papers.

We raised this issue of the --

THE COURT: I think someone who is an hourly employee at one of these funeral homes who is doing janitorial work is not going to be required to do community service work. So, I think that is the type of refinement that is necessary here, although I can read enough of the papers that have been prepared to discern what they are really looking at.

MR. LAMPE: Well, their explicit response, when we pointed out the class definition problem was, if that definition is wrong, we actually mean all nonexempt employees.

THE COURT: I don't think that is the case either.

MR. LAMPE: No, Your Honor. In fact, we would encourage the Court to look at our exhibits and, in particular, we have an Exhibit F, and this exhibit lists all of the different nonexempt positions within Alderwoods. There is twenty-five of them and there is many of these positions that you have assumed. There is grave digger,

grounds keeper, maintenance --

THE COURT: Those people are not going to fall within this, and I am not sure they are on call, those people. Maybe they are. I don't know.

Let me hear from the plaintiff's side.

MR. LAMPE: One other point.

THE COURT: Yes.

MR. LAMPE: In the chart that is Exhibit F, what we have done is, we have taken the position descriptions for these twenty-five positions and we put a check next to any position that lines up with any of these policies that are supposedly at issue in the case.

THE COURT: Just for future reference, any time there are going to be any lengthy documents like this filed, if you could supply the Court with a courtesy copy that's tabbed and marked, I would really appreciate it.

MR. LAMPE: We will certainly do that, Your Honor. I apologize.

THE COURT: It is tough to find it here because I don't have it tabbed.

MR. LAMPE: The last piece of paper in our brief is the summary of those position descriptions, none of the nonexempt employees whose job description --

THE COURT: Okay.

MR. LAMPE: You are exactly right. Look at the

on-call responsibility of the twenty-five positions. There are only three that have that. There are only three that are involved in selling insurance, only three that are commissioned, and there are six that are involved --

THE COURT: And the notice would not go out to everybody, because somebody is going to get a notice, you hope, gee, I am going to get a big benefit here. If I opt in, I am going to get money, but they are not going to ever be in at one of those classes.

MR. LAMPE: Our position is that there should be no notice --

THE COURT: It has to be tailored to those that are affected and there is going to have to be some way to identify which class they are in.

MR. LAMPE: The only evidence before the Court as to all of these positions, with the exception of funeral director, is the evidence that we put forward. There are no affiants who are not funeral directors or assistant funeral directors, and that simply is not spoken to in the record.

THE COURT: They may be the bulk of the class because those are the ones that are in all categories.

MR. LAMPE: The funeral directors is, but a fraction of the potential all nonexempt employee group, you are absolutely right about that.

THE COURT: It is not going to be all nonexempt

employees, it can't be, because I don't think the facts would support that.

MR. LAMPE: So, we think it should be four locations and limited to funeral directors or funeral director types as indicated on our chart here that could possibly have been involved in these policies.

But, again, we think that, in light of the fact that we have written lawful policies and we are talking about such a very few, five affidavits out of over thousands and thousands of employees, it's just insufficient under the standards to justify any notice. Thank you.

MR. THOMAS: Your Honor, I think there is probably less disagreement about this point than most of the other issues in the case.

We don't have any desire to send notice out to people who I think there were two competing -- we don't have any desire to send out notice to people who do not fall within --

THE COURT: Who have the responsibilities which would have generated these FLSA issues?

MR. THOMAS: Correct. It is not in our good or the Court's.

The other practical problem though, in having dealt with these cases many, many, many of these cases is, the clock is ticking right now. And the problem is, if we spend

years, months, weeks sorting out who could potentially be in the class and who could not, the time could run out on these people.

THE COURT: But, you can't send it out to everybody. There got to be a practical solution here where you get a list and see who had these positions during this period of time and that's who the notice goes to.

MR. THOMAS: The problem is, I am not sure that the -- this is the bigger concern. And the other concern is, if you don't send it out to everyone who is supposed to get notice, you have people hanging out there whose claims are lost because of a mistake.

THE COURT: There is not much we can do unless you want to give a notice in a national newspaper, or something like that. But, I don't think that that is cost justified in this type of case.

What do you want to have happen here?

MR. THOMAS: What I would like to have happen is notice to go to anybody who could potentially have a claim.

THE COURT: If you are the defendant -- that is too broad. I mean, that's putting a terrible burden on them. You have to have some -- I am sympathetic to the individuals who are losing rights.

But, on the other hand, you can't tell a defendant, at your own peril, you better notify everybody in the world

that they may have it. You have people on your side who are knowledgeable about the structuring of these entities and who did what and how they did it. And if this exhibit is correct, these are the people that would get it. And if one or two are lost, you have a lot of word of mouth among these people, I am sure, all around the country, or you put out some notification in a journal, or something, that would attract their attention, some other way to deal with that concern that you have.

MR. THOMAS: I think what I would suggest is this: Here's another concern I have --

THE COURT: I am not going to have you put a burden on the defendant that is too broad-based and makes them having to flail around and spend a lot of time and money when it has to be more focused.

MR. THOMAS: What I would propose is this:

First of all, I am concerned about relying on job titles alone because often in these locations, you have issues where the person may be listed as an embalmer. That's what their official job title is. That's what they are coded as. But, they are, in fact, doing funeral director responsibilities and always have been and sort of known for doing that, but just for the sake of internal company documents, they are referred to differently.

I think that if we did two things, one is liberally

see anybody who could be within the group and, number two, make sure that the notices are posted at the funeral homes to say, listen, notices have gone out to people who appear to be within this group. However, if you didn't receive a notice but you were doing these type of things, we are informing you that you may have a claim and you need to do something about it, and put that posting up for ninety days.

THE COURT: I just have to take a break because I have a criminal matter -- I have to just go off the bench for a moment.

Talk about, when I am out of here, if there is a way to refine how you can identify these individuals.

(Court recessed at 4:40 p.m.)

(Court reconvened at 4:45 p.m.)

THE COURT: Okay. Please be seated. Okay.

MR. THOMAS: Your Honor, I had a chance to confer briefly with my side on this, but I haven't had a chance to talk the other side, but I think we may have -- let me put a proposal here that may make some sense.

What we would be prepared to do is to talk -- speak to Mr. Lampe over the next, I would say -- first, while the toll is in effect, so people aren't losing their rights, we have a toll in effect.

THE COURT: I thought the total was over --

MR. THOMAS: It started again if we are cutting

people's time off --

THE COURT: I think the defendants said no to that in the past and I think they would say no again.

My preliminary assessment -- and it is going to be my final assessment -- is that a collective action notice would be appropriate to go out, but I have to have an appropriate class and the notice has to be appropriate.

I have trouble with the breadth of the parties, we just talked about that, I have trouble with, how do we say who is in which class, you know, the five subclasses. The notice that was attached to your form doesn't deal with any of that. It seems to talk broadly in terms of the hourly employees, and all of that.

So, I will permit the class notification to go out, but I need you to re-submit a form of notice and a redefinition of the classes that is more narrowly drawn, and some of the -- I just want to get to --

You have, like, number one for Alderwoods current and former hourly employees of defendants.

Well, that's not going to be the case. It is going to be some discrete subset of those hourly -- it is not all hourly employees. So, it is how do you define those hourly employees who would be in the community work policy? And there appear to be five categories. So, you are going to have to refine that.

Then you go on to say who were suffered or permitted. I think it has to be who were required because I don't think it is a violation if somebody just permitted you to do community work service. I think that would be --

MR. THOMAS: Tied more to the regulation.

THE COURT: Right. So, it has to be -- because there is no violation if they weren't required as part of their job to --

MR. THOMAS: I think the regulation is encouraged.

THE COURT: Okay.

MR. THOMAS: We can tailor that to the regulation.

THE COURT: Whatever it is. I mean, it is something where it is -- as a condition of their employment, there was something that they were expected to do if they were going to keep their job. That's the way I understand it, you get paid for that, if there is a violation, and the same thing as with two. And then they -- the training policy, that's the same issue, and the people that would be in that, and four and five. So, those are -- all have the same similar kinds of issues.

And then when you look at the form of the notice, I didn't have attached to it the form of consent that they would be -- at least my copy didn't have a consent form so we could see what they would be sending back. And the question is, who sends out the notice? You know, does that -- do you

give the notice to the defendant?

MR. THOMAS: We would bear the burden of the cost for that, unless they want to pay for it.

THE COURT: But, you need to coordinate how you are going to get the list, the mailing list, you just give that to them and they certify that they sent it, however you want to do it, but I need that process done, so I need a restatement of the classes that comport with what I discussed here today.

We need the revised notice, you know, that it would be appropriate. And the notice, how it is going to go. Is it going to go by mail to these individuals? How do you get the list? Do you turn it over to the defendants?

You need to coordinate with the defendant so I have a way of understanding that. And then I need to see the form of the consent that they are signing, that they will be expected to sign as well.

So, the sooner you get that in, the sooner the order will be able to go out, because my order won't become final until I have the refined classes and the appropriate form of notice that I feel is appropriate.

MR. THOMAS: Your Honor, we sincerely appreciate all of your efforts to issue quick decisions when I know there is a lot on your docket.

One request, which is typically done in these

cases, and I request that we do it here, that is within fourteen days, the sides either submit to you an agreed -- mutually agreed notice and form. If that's not done --

THE COURT: It would be without prejudice to the other side's right to preserve -- but, I mean, they are going to be objecting to what I have done here today, I am assuming.

MR. LAMPE: In part.

THE COURT: So, if you can agree that whatever that is produced is consistent with my order, it does not mean that you are agreeing that I made the right decision, but if you can mutually agree that this comports with what I have ordered today, that would be helpful and we can move on.

MR. THOMAS: If there are issues that we can't agree on, both sides --

THE COURT: Then you have to come back here promptly.

MR. THOMAS: We'd submit our notice, their proposed notice so you can see the difference.

MR. LAMPE: That makes sense to us. If there is a disagreement, it may go to the content or manner of distribution. We will try to work that out, both sides.

THE COURT: And I am going to impose on both sides an obligation to work diligently because I am finding that it is the collective notice -- I will say there will be a

determination at the first tier that the class will be conditionally certified along the lines that I described. They have to be narrowly limited to those employees who would fit within the work issues that were raised, and the workers have to be, the classes have to be refined to reflect that and to be more consistent with the regulations, and then we need to work out how the notifications will go out and the form of the notice has to be changed to reflect what we have talked about.

MR. THOMAS: Your Honor, one last issue on the joint employer SCI issue. We may be able to submit that briefing to you without any additional discovery, but we would request an order today that if we need limited discovery on that issue, that that be expedited and begin immediately and be turned around in less than fifteen days.

THE COURT: It depends on what kind of volume of material you are asking for.

MR. THOMAS: I don't think much. But, we have had disagreements with defense counsel about whether discovery can proceed. But, we would request that the Court's direction be that it be done immediately and in an expedited basis. We will try to work cooperatively with them, but we would like there to be an understanding that discovery on that issue is to be going forward as quickly as possible since it is so important.

MR. LAMPE: Your Honor recalls from the hearing in January that Mr. Thomas indicated he did not need any discovery and he was confident he could settle with what he had --

THE COURT: At least I am concerned today that at SCI, that that's not the case.

MR. LAMPE: If he wants to go take discovery, obviously as you said in the hearing, it has to be a two-way street and there can't be any parameters on how many days because they don't know what we want and I don't know what they want. We need to discuss it before there is any sort of restriction.

THE COURT: You meet and confer on a discovery plan, okay? And find out what you are going to need, what you are going to be asking for. You should have a meet and confer sometime next week as to what the parameters are. It is a two-way street when you are going down there. That way, if you feel you need some limited discovery with respect to this issue that is contemplated, that can happen.

So, you need to do that. And if you want to get together again, if you can agree on it, you can just start. If you have to know something, say what you want and how long you need to take it, and the other side can respond. We will let you file something like that, but you have to notify the other side that you are asking for an expedited hearing. The

response turn-around should be two business days, and I will try to have a hearing within a week on that.

So, that the sooner you get working and seeing what you need to do, you know, you will be protecting the interest of the parties that you are seeking to represent as class members here. But, so it is up to you really to do that. So, just work together, to the extent that you can, if they want discovery.

On the other hand, to be responding to it, you are going to have to make that available as well.

MR. THOMAS: Certainly, Your Honor.

MR. LAMPE: We just would reserve the right to object to having to turn anything around in two days. If there is a brief we have to file within two days of getting their brief, it may not be possible. We may be asking for additional time to do that.

THE COURT: It is going to depend. But, I think that should be the goal. If they can get something out two days from now and you can respond in two days, I think if it is somewhat short, that is fine. We can have a more full dialogue and a telephone conference if necessary.

MR. THOMAS: Your Honor, those issues --

THE COURT: That is the goal, is what I am saying. I am not ordering that that is the case. That would be the goal. Because if they are going to ask for an expedited

hearing, you have to ask for it.

MR. LAMPE: Right.

THE COURT: If you feel you can't do it, you respond that way.

THE COURT: Okay? So, we need to set a time for the argument on the motion to dismiss. There just wasn't enough time to get all of this in today.

How about June 8th at two o'clock?

MR. THOMAS: That's fine with us, Your Honor.

MR. LAMPE: That is fine with us, Your Honor.

THE COURT: That's a Friday at two o'clock. Okay? And so I will look for you, and it is so ordered on the record today that the findings that I made with respect to the evidentiary materials that support the plaintiffs' motion, as well as the lack thereof with respect to Alderwoods, and the lack thereof with respect to SCI, the Court will conditionally certify the class as reflected on the record today, and it's subject though to the plaintiffs' filing with the Court the revised class description, a revised notice that comports with what the Court has said today, as well as a plan for notice which would include how the notice is going to go out, and I will need to see the consent form that's an exhibit to the file.

Anything else I overlooked?

MR. LAMPE: Your Honor, I wanted to ask one

question.

Have you reached a conclusion yet about the geographic scope?

THE COURT: The geographic scope, I am going to say is national. I think the -- I am sufficiently -- at this stage of the proceedings, applying the liberal standard looking at the managers who are professing to have personal knowledge in their positions of the corporate policies, the Court finds at this stage that that is sufficient.

MR. THOMAS: Thank you, Your Honor.

THE COURT: Okay? It is all subject to reconsideration at the second stage.

MR. LAMPE: Yes, Your Honor. Thank you.

(Court adjourned on Thursday, April 19, 2007, at 4:30 p.m.)

* * * * *

I certify that the forgoing is a correct transcript from the record of proceedings in the above-entitled matter.

S/Michael D. Powers
Michael D. Powers
Official Reporter

*****NOT CERTIFIED WITHOUT ORIGINAL SIGNATURE*****

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH PRISE, et al.,

Plaintiffs,

vs.

ALDERWOODS GROUP, INC., et al.,

Defendants.

Civil Action

No. 06-1641

Transcript of proceedings on September 6, 2007, United States District Court, Pittsburgh, Pennsylvania, before Joy Flowers Conti, District Judge

APPEARANCES:

For the Plaintiffs: J. Nelson Thomas, Esq.
Patrick J. Solomon, Esq.
Charles H. Saul, Esq.
Liberty J. Weyandt, Esq.
Justin M. Cordello, Esq.

For the Defendants: Matthew W. Lampe, Esq.
Amy E. Dias, Esq.

Court Reporter: Richard T. Ford, RMR, CRR
619 U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-0802

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

(Proceedings held in open court; September 6, 2007).

THE COURT: This is a hearing in Prise versus Alderwoods Group, Inc., Civil Action No. 06-1641. The hearing concerns a question as to whether or not notice should be sent to employees of Service Corporation International.

Will counsel please enter your appearance.

MR. THOMAS: Yes, Your Honor, Nelson Thomas, Dolin, Thomas & Solomon.

MR. LAMPE: Matt Lampe, Your Honor, Jones Day, on behalf of the Defendants.

THE COURT: I notice a number of other people are present here. Are the two that have just entered your appearance the ones who will make the argument?

MR. THOMAS: Yes, Your Honor.

THE COURT: Would the others just like to be on the record so we know who is present.

MR. SOLOMON: Patrick Solomon for the Plaintiffs.

MR. SAUL: Charles Saul of the firm Margolis Edelstein for the Plaintiffs.

MR. CORDELLO: Justin Cordello.

MS. WEYANDT: Liberty Weyandt from the firm Margolis Edelstein.

MS. DIAS: Amy Dias for the Defendant.

THE COURT: Thank you. The briefing of the parties is, quite frankly, like two ships passing in the night because

the views of the law are just dramatically different from each side. So I just want to take a moment and reset the framework for this.

The Plaintiffs are requesting that a collective action notification be sent as a result of alleged violations of the Fair Labor Standards Act, the FLSA. The subclass proposed as to the Defendant that is at issue here -- because one notification has already gone out with respect to the Alderwoods Group, Inc., I might be mistaken on that, there are some other issues coming up on that. The question concerns the ultimate parent of the organization, which is Service Corporation International.

The class would be current and former hourly employees of Defendants who were suffered or permitted to perform work by handling calls and other work related issues after hours, but not compensated by Defendant for such work performed after the workday off-site from the funeral home -- the on-call pay policy.

The Plaintiffs are asserting that the Defendant -- we will call the Defendant SCI for ease of reference -- is their employer under the FLSA. The Defendant says no, it is a mere holding company and has no employees.

The problem I had was that the Plaintiff in the briefing set forth a lot of factors which, if they were true, would implicate an employment/employer relationship, which is

a very broad concept for purposes of the Fair Labor Standards Act.

But Defendant has set forth affidavits, which have not been contradicted to this Court's knowledge, showing that those allegations are simply not true.

Just to give a preview, the definition of employer under the FLSA, as set forth in 29 United States Code, Section 203(d), provides that an employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

The courts have to look at an economic reality test and a totality of the circumstances test that the courts look at, and the courts have noted that there's a broad definition, it's broader than what would normally be the case in a traditional common-law sense. Those cases are Rutherford Food Corp. versus McComb, 331 US 722, 1947; Zavala versus Wal-Mart Stores, Inc., 393 Fed Supp. 2d 295, District of New Jersey, 2005. There are a number of others that stand for that same proposition.

The cases -- and I have read all of the seminal Supreme Court cases that were decided, as well as the other cases cited by the Plaintiffs in this situation, and also the regulation which is set forth in 29 Code of Federal Regulations, Section 791, and I think it's (b) -- I have to get my copy of that. The one that has the applicability in

this case is (b)(3), but I did want to quote for purposes of the record the exact language of (b)(3), which I had printed. Can you reprint that for me?

THE LAW CLERK: I will.

THE COURT: Thank you.

I also read the cases that were cited in the WESTLAW version of the Code of Fed Regulations that are cited under that section. Quite frankly, the cases that are implicated here mainly deal with individuals who are shareholders or officers of a corporation. As the shareholder, they may have been the majority shareholder or controlling shareholder. The courts have found those individuals in certain circumstances to be employers.

But there was generally some affirmative conduct that was involved, direct involvement in the operations of the business such that the courts could find some relationship, more than just being a shareholder. That there was direction and control actually being exercised.

When I looked at the cases that the Plaintiff has cited, the cases of the Plaintiff generally dealt with situations where there was some affirmative action being taken by the person sought to be held as the employer.

For example, in the Alba versus Loncar case, which was 2004 WESTLAW 1144052, Northern District of Texas, May 20, 2004, the Court there was considering whether an

individual's control over the employees of a corporation were sufficient to warrant a finding of an employer/employee status.

The Court there found that there were certain managerial responsibilities and substantial control over the terms and conditions of the employment. So they were looking for operational control in some sense. I don't think it had to be complete, but it had to be substantial.

Indeed the seminal decision of the Supreme Court, and they all seem to be fairly old cases going back into the 1940s and the most recent being the 1973 decision of the Supreme Court in Falk versus Brennan, 414 US 190. In that case there was a partnership that was providing management services for a number of real estate apartment complexes, and the Supreme Court there found that even though the individuals may have been paid by the separate -- at issue may have been paid by the separate apartment complexes, the partnership could actually be an employer as well, and what they looked for was -- this is on Page 431 -- they looked at the extent of the managerial responsibility at each of the buildings, which gave that partnership substantial control of the terms and conditions of the work of the employees. So they were looking really to the actions.

When you look at the regulation that's been raised here, there were two things that I wanted to bring to bear

here. The first is that the Plaintiffs cite Section 791.2(a) for the proposition that there has to be some kind of a showing that they are completely disassociated. But if you read that phrase in context, what the entire sentence says is: If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee who during the same work week performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer.

So in (a) they are not dealing with a parent/subsidiary relationship we have here; they were talking about someone who works part-time for one entity in a week and part-time for someone else in a week.

The question is when can you lump those two employers together, and the Court in that circumstance -- I mean the regulation in that circumstance was looking for some kind of complete disassociation because of the nature of how the work was being performed during the same week. So I think you can't take that completely disassociated just out of context in terms of what was the concern being addressed in Section 791.2(a).

Then when you get to (b), because I think this is the one that is more directly relevant here, because what they're concerned with in (b) is a benefit. It is where the

employee performs work which simultaneously benefits two or more employers or works for two or more employers at different times during the work week, a joint employment generally -- relationship generally will be considered to exist in situations such as.

So at best what you have here is, arguably, performing work which will simultaneously benefit two entities because you could argue going up the chain that whoever is working at the lowest tier subsidiary, there could be some indirect benefit flowing up to the parent level.

Then when you get to subpart (1), it has to deal with if there is an agreement to share, and I don't think there is any issue here that there is any sharing of the employee.

The second aspect of that regulation is where one employer is acting directly or indirectly in the interest of the other employer in relation to the employee. And I think that's probably the management kind of services. If you are stepping in and providing management services and you're doing that in relation to the particular employer, maybe you could be caught up in the parameters of the regulation.

The final one, which is the only one I think that has some, arguably, applicability here, is (3), where the employers are not completely disassociated with respect to the employment of a particular employee. And I don't know what

completely disassociated means in this context, and it could mean that you're providing some services for one, some services to another.

But it goes on to say that: May be deemed to share control of the employee, directly or indirectly, by reason of the fact that one or more employer controls or is controlled by or is under common control with the other employer.

The cases that are cited there are the same kinds of cases that the Plaintiff was citing where there was some individual generally who was actually providing the hands-on management and was interfacing and making decisions, directs decisions, relevant to the particular employee or employees in question.

So these were not the cases where you have a parent company and a subsidiary, and that's the sole relation that you have, and you don't have the parent actually managing the business of human relations or anything else like that.

So that's why when you first read the Plaintiffs' brief, the Plaintiff is making all the arguments, they're providing human relations services, they're providing the benefits, they're providing policies, all of that type thing.

The response by the Defendant shown by affidavit said that was not the case. That there were other entities. So there may be other employers here who may be appropriate to be brought in, but it doesn't appear that it would be SCI if

SCI as the corporate board is not doing something overtly to be involved in the management or the operational control of the businesses.

So that's the problem that I see here for the Plaintiffs. So I will hear from the Plaintiffs first.

MR. THOMAS: Your Honor, you -- I understand your position on that, and I don't think -- I will leave it be. I understand where you are coming out on that. I think that probably what makes the most sense is for us to, if the test is going to be focusing on the operational control, they have certainly listed those entities in their papers and we will either file a new complaint or amend this one to bring those in, and then we will tee up the issue on that score.

THE COURT: Right. One other thing I wanted to mention, when you look at the definition in Section 203(d) where it defines the person, and it says any person acting directly, so that in itself connotes there has to be some affirmative action. It can't be just totally passive.

There are a number of lower court decisions where you have just the pure parent/subsidiary relationship where the parent really is a pure holding company and has no operational functions of any kind. The lower courts that have considered this view that as not being an employer for purposes of this statute.

MR. THOMAS: That's fine. We can bring in those

individuals potentially and we will see where we go. But the operational people have been identified and the operational entities, and that may be a better approach, and we have that in their papers and I think that would be the next step.

THE COURT: So I will deny this motion. And I think also that would give me the grounds to grant the summary judgment at this stage without prejudice if you are going to continue to try -- are you going to continue to try to keep SCI in?

MR. THOMAS: Yes, Your Honor, and maybe I would make the motion now for leave to amend the complaint to add in the -- at least the entities they have identified in their papers, which are the SCI Eastern Market Support Center LLP, SCI Western Market Support Center, Houston Market Support Center, and the SCI Funeral and Cemetery Publishing -- or Purchasing Cooperative.

So we request that that be deferred until we make our motion to amend and motion for notice for those people. We may be adding in individuals or different entities, I don't know.

THE COURT: Because that seems to be what they are looking for. In all the cases -- and I did read the Defendants' cases and the Plaintiffs, and particularly the Supreme Court cases, and they were all looking for some kind of exercise of control, not just the mere power to control,

but somebody that was actually an entity or a person that was actually, you know, involved with the employee.

MR. THOMAS: And I think from their papers you have that there. They say these were the ones that did the HR functions, these are the ones that interfaced. If it is simply a question of putting in the new party that has that, we request leave to amend and put those in.

THE COURT: Okay. I will hear from the Defendant.

MR. LAMPE: Well, since the Court has decided to deny the motion, I am not going to speak to that.

I think the two issues that you want to hear from me on is, first of all, you raised the point about the summary judgment motion.

THE COURT: Right. I specifically said it wouldn't be argued today here. But in light of their statement that they're willing to -- or they want to amend the complaint, I just don't know if that should be denied without prejudice at this time because I don't know -- it is really difficult when you have serial summary judgments and that type of thing. So that for judicial economy would be my question where to go from here.

MR. LAMPE: The two named Plaintiffs, Prise and Rady, they never worked for SCI or even an affiliate of SCI. During the time that they were employed by Alderwoods, Alderwoods was a competitor.

THE COURT: So they would have to amend the complaint to bring in another Plaintiff too then.

MR. LAMPE: Right. We think as to SCI, the named Defendant in this case, these two named Plaintiffs couldn't possibly have a claim against them. You have already determined that SCI is not an employer, and even if it were --

THE COURT: At least they haven't presented anything to get the notification.

MR. LAMPE: Correct. But even if they were an employer, they certainly wouldn't be Ms. Prise and Rady's employer because those two people left Alderwoods before there was any association of any kind between Alderwoods and SCI. We think -- we do think it makes sense to dismiss SCI from the case. There certainly aren't any facts that would suggest the two named Plaintiffs could have any kind of a claim against them.

Then as to the request to amend the complaint, I think -- I would need to look to see whether we would have grounds in the law to oppose that. I know the rules on amendments are fairly liberal, but I am also sort of struck by the fact that we were together back in April and Mr. Thomas raised back then the fact that he needed to take some discovery to find out what the interrelationships were among these various corporate entities. We agreed to that, and they have taken no discovery. A half a year has now passed and it

seems to me that the time to investigate which corporate Defendants should be brought into the case was a half a year ago, not now. This case is coming up on a year old and we're talking about trying to bring two completely separate corporations into this lawsuit.

This class period, if you go back three years, to the vast majority of this class period, Alderwoods and SCI are competitors. There is no relationship at all. As of November of last year they became related. But there's no request for injunctive relief in this case. This is a damages case.

Again, I would want to research this and be able to formally respond, but I think our inclination would be it is too late to try to continue to dredge up some SCI entity to drag into this case which is an Alderwoods case.

THE COURT: If at the time -- I think what they are saying is if at the time in issue, unless you have some other Plaintiffs that come up later, their argument is that these Plaintiffs don't have anything to do with any SCI entity.

MR. THOMAS: Your Honor, that was addressed in our summary judgment papers, which is --

THE COURT: I haven't really spent a lot of time on that.

MR. THOMAS: Exactly. I was not prepared today to be dealing with that based on the Court's decision.

However, what we point out in those papers is there

is currently over 50 Plaintiffs in this case who are -- and actually substantially more -- who are SCI employees and who under --

THE COURT: I think what you need to address is whether you need additional -- you can amend to add Plaintiffs as well. But if they are not -- if they don't have the same basis, I mean, if this all happened under Alderwoods and SCI just inherited them because of their acquisition, they may have inherited the liabilities through the Alderwoods entity that they acquired and they may have to be indirectly financially responsible. But as a separate entity, maybe they don't have a role to play here.

MR. THOMAS: Actually, Your Honor, when I referred -- there is over 500 Plaintiffs in this lawsuit. Under the FLSA, they are actually party Plaintiffs, they actually become parties, so there is actually over 500 party Plaintiffs here. Over 50 of those are direct SCI employees. So I think that Mr. Lampe's point is not well-founded in terms of this. We do have over 50 SCI Plaintiffs.

That said, based on what I just heard, we will have to evaluate all of our options.

I guess another -- I too am concerned about -- I want to get this case moving forward.

THE COURT: Right.

MR. THOMAS: It may be easier for us, and we will

evaluate everything, I don't know what we conclude, we may conclude just simply filing another complaint against SCI and name these people officially, we may choose that. We may speak to Mr. Lampe to see if he consents. We may bring a motion to amend.

THE COURT: Is there any concern the same activity is still continuing?

MR. THOMAS: Yes, Your Honor, it is. Again, the statute of limitations of people is dropping off and we are very concerned about that. So, again, much like Mr. Lampe, I don't want to answer today not having done the research on the statute of limitations and the parties and the best course, but I think that really whether it's by -- this issue is not going to disappear, it is either going to be by separate complaint or motion to amend, we will get this teed up as soon as possible so we can get these employees -- and, you know, the Defendants, although they say they are concerned about the length of the case, they have knocked off a third of their liability by the length that has gone on already and we want to put that -- we want to put that to an end now. So we are going to move as quickly as we can so that these employees shouldn't be bearing the cost of what has --

THE COURT: So this motion will be denied on the notification for the reason that there wasn't sufficient evidence presented to the Court to implicate an

employer/employee relationship with SCI. And I will cite the standards of the Falk decision and -- there is a recent Maryland case, Glunt versus GES Exposition Services, Inc., 123 Fed Supp. 2d, 847, District of Maryland, 2000. There's a couple other decisions like this that are cited. Those are the lower courts I said that have considered this, just a simple parent/subsidiary relationship.

But if you wish to amend the complaint, you will file a motion to do that and it can be responded to in due course. If you want to meet and confer to try to expedite this, it isn't good for either party to have these issues languishing. So I think we need to move on from there so that the case can progress.

MR. THOMAS: Your Honor, we would like to get, once the motion is made, as expedited a schedule as possible to get that done. Procedurally how would you prefer us to request when we file the motion that there be --

THE COURT: Ask for an expedited hearing. File a separate motion asking for an expedited hearing and a shortened briefing schedule. The other side has to have an opportunity to respond. So if you ask for an expedited briefing schedule and an expedited hearing, I will see those as they come in.

MR. THOMAS: Thank you, Your Honor.

THE COURT: Okay. Anything further?

MR. LAMPE: Not from me, Your Honor, thank you.

THE COURT: Thank you all.

(Record closed).

* * * * *

C E R T I F I C A T E

I, Richard T. Ford, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

S/Richard T. Ford _____

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH PRISE AND HEATHER RADY Plaintiffs, v. ALDERWOODS GROUP, INC., BURTON L. HIRSCH FUNERAL HOME, INC., H. P. BRANDT FUNERAL HOME, INC., H. SAMSON, INC., NEILL FUNERAL HOME, INC, & SERVICE CORPORATION INTERNATIONAL Defendants.	Civil Action No. 06-1470 Judge Joy Flowers Conti JURY TRIAL DEMANDED

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

NOW COME, the Plaintiffs, Deborah Prise and Heather Rady, by and through their attorneys, MARGOLIS EDELSTEIN, CHARLES H. SAUL, ESQUIRE and LIBERTY J. WEYANDT, ESQUIRE, and file the following Motion for Leave to File Second Amended Complaint and aver as follows:

1. This civil action was originally filed by Plaintiffs Prise and Rady on November 6, 2006, which sought relief against Defendants Alderwoods Group, Inc., Burton L. Hirsch Funeral Home, Inc., H. P. Brandt Funeral Home, Inc., H. Samson, Inc., Neill Funeral Home, Inc., under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §2000(e), *et. seq* ("Title VII") and the Equal Pay Act, 29 U.S.C. § 206 ("EPA").

2. Plaintiffs filed an Amended Complaint on February 23, 2007, in which Plaintiffs added Service Corporation Inc., as a Defendant in the case. Upon information and belief, Plaintiffs

averred that Alderwoods and SCI merged on or about November 28, 2006, via an "Agreement and Plan of Merger," dated April 2, 2006 (see Exhibit 1), which occurred after the filing of Plaintiffs' original Complaint.

3. It was Plaintiffs' intention to include SCI as a Defendant under a theory of successor liability. However, Defendants interpreted Plaintiffs' Amended Complaint differently, and believed that Plaintiffs' claimed that SCI was the actual employer of Plaintiffs during the time period of the alleged incidents.

4. Defendants' interpretations of what Plaintiffs' Complaint alleges are hypo-technical and exaggerated, in light of this Court's liberal notice-pleading requirements. It has been confirmed to Defendants that Plaintiffs do not claim that SCI was their employer during the time period in which the incidents alleged in the Complaint occurred, but that SCI is alleged to be liable under a successor liability theory.

5. Plaintiffs' counsel offered to amend the Complaint to clarify Plaintiffs' position with respect to Defendant SCI in order to resolve this conflict. However, Defendants' counsel refused to consent to Plaintiffs' filing of a Second Amended Complaint, (to resolve the problems which Defendants complained of), but instead demanded the Complaint be withdrawn, or Defendants would request Rule 11 sanctions[1].

6. Defendants' counsel then claimed that Alderwods and SCI did not merge. Defendants asserted that Alderwoods and SCI are two separate and distinct corporations, and, therefore, Defendants claim that SCI is not a proper party in this action.

---

[1] Plaintiffs believe that Defendants wanted Plaintiffs to withdraw their Complaint, such that when a new Complaint was filed, Defendants could then assert that the statute of limitations had expired.

7. The parties appeared before the Court on May 23, 2007, for a status conference, during which the above issues were discussed. The Court permitted Plaintiffs the opportunity to file a Motion requesting leave to file a Second Amended Complaint and also permitted Defendants to file a response thereto[2].

8. Upon information and belief, Plaintiffs aver that Alderwoods and SCI effectively merged on or about November 28, 2006, through the use of a subsidiary corporation, Coronado Acquisition Corporation ("Coronado"), created solely for the purpose of SCI's acquisition of Alderwoods. The merge of SCI's interests with that of Alderwoods has been scrutinized at length by the Federal Trade Commission. The two entities signed what has been publically referred to as "Agreement and Plan of Merger." (Exhibit 1). Public records also state that SCI acquired Alderwoods. The merger of the two entities is somewhat complicated, and without the benefit of discovery, Plaintiffs are unable to ascertain for certain the true relationship between Alderwoods, SCI and SCI's wholly owned subsidiary, Coronado.

9. SCI has already legitimately been named as a party in Plaintiffs' First Amended Complaint. In all fairness, Plaintiffs' request to amend the Complaint again, with respect to Defendant SCI, stems from Defendants' complaints about the amendment. In all fairness, the relationship between the two entities is complicated and confusing with numerous filings with the SEC. Defendants have stated that another entity, namely Coronado Acquisition Group ("Coronado"), was created to effectuate the acquisition of Alderwoods. Coronado is believed to be a wholly owned subsidiary of SCI. According to documents filed by SCI with the SEC, Alderwoods

---

[2] Should the Court grant Plaintiffs' Motion, new deadlines for Responsive pleadings and responses thereto will need to be set.

and Coronado merged, and became a wholly owned subsidiary of SCI, which is now called Alderwoods (see Exhibit 1). Plaintiffs contend that this makes SCI a successor in interest to Alderwoods.

10. Upon information and belief SCI has acquired all the stock and assets of Alderwoods. It is also Plaintiffs understanding that SCI agreed to assume all of Alderwood's liabilities, based upon a review of limited documents which have been available for review. Since the merger between Alderwoods and SCI took place after the filing of this suit, and after the EEOC investigation, SCI either knew, or should have known of the action and, therefore, should have been aware that they would also be taking on responsibility for the liabilities of Alderwoods that have been alleged in the Complaint.

11. A true and correct copy of Plaintiff's proposed Second Amended Complaint is attached hereto and marked as Exhibit 2.

12. Additionally, Plaintiffs also wish to amend their Complaint to include allegations under the Pennsylvania Human Relations Act. Subsequent to the filing of the First Amended Complaint, Plaintiffs received Notices of Rights from the Pennsylvania Human Relations Commission, dated April 17, 2007. Therefore, Plaintiffs wish to amend their Complaint to include causes of action which arise under the Pennsylvania Human Relations Act ("PHRA"), of which this Court has supplement jurisdiction. See attachments to Exhibit 2.

13. No party is prejudiced by the filing of the Second Amended Complaint. Defendant SCI has already been named as a party to the action via Plaintiffs' First Amended Complaint. The Amendment with respect to SCI is to clarify Plaintiffs' position that SCI is liable under a successor

liability theory, which is being done in part to rectify Defendants' complaints with respect to the pleading. The amendment with respect to the PHRA claims is the type of amendment which is routinely granted by the Court, in light of the fact that Plaintiffs could not have included such causes of action in their Complaint until they were given the right to do so by the PHRC. Furthermore, the PHRA claim, mirrors the claims already pled under Title VII.

WHEREFORE, Plaintiffs, respectfully requests that this Court grant the instant Motion for Leave to Amend Complaint.

Respectfully submitted,

MARGOLIS EDELSTEIN

Date: 6/8/07

/s/ Liberty J. Weyandt

CHARLES H. SAUL, ESQUIRE
PA I.D. #19938

LIBERTY J. WEYANDT, ESQUIRE
P.A. I.D. #87654

525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
(412) 281-4256

Attorneys for Plaintiff